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Local Union No. 71, International Brotherhood of Electrical Workers and Thompson Electric, Inc. and the International Union of Operating Engineers, Local 18, AFL-CIO. Case 8-CD-504

July 14, 2009

**DECISION AND DETERMINATION
OF DISPUTE**

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). Thompson Electric, Inc. (the Employer) filed a charge on December 3, 2008, alleging that Local Union No. 71, International Brotherhood of Electrical Workers (Electrical Workers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Electrical Workers rather than to employees represented by the International Union of Operating Engineers, Local 18, AFL-CIO (Operating Engineers). The hearing was held on January 15 and 23, 2009, before Hearing Officer Steven Wilson. At this hearing, Operating Engineers moved to quash the proceeding. Thereafter, the Employer, Electrical Workers, and Operating Engineers each filed a posthearing brief.

The National Labor Relations Board¹ affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is an Ohio electrical contractor engaged in commercial, industrial, utility, residential, and highway electrical work, including the removal and installa-

tion of highway lights and traffic signal fixtures. The parties stipulated that, annually, the Employer purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Ohio. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Electrical Workers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer installs and maintains highway and street sign lighting, electric message boards, and traffic control systems in Ohio. The Employer is a member of the American Line Builders Chapter, N.E.C.A. (NECA) and, as such, is a party to a collective-bargaining agreement with Electrical Workers, effective December 31, 2007, to January 3, 2010. The agreement with Electrical Workers requires the Employer to use Electrical Workers-represented employees for the "installation and maintenance of highway and street lighting, highway and street sign lighting, electric message boards and traffic control systems, camera systems, traffic signal work, substation and line construction, including overhead and underground projects" and "includes the operation of all tools and equipment necessary for the installation of the above projects."

The Employer does not have a collective-bargaining agreement with Operating Engineers. However, Operating Engineers has a collective-bargaining agreement with the Ohio Contractors Association (OCA), of which Shelly & Sands, Inc. (Shelly) is a member. That agreement, effective May 1, 2007, to April 30, 2010, covers "Highway Construction," and requires that "all subcontractors . . . be subjected to the terms and provisions of this Agreement."

In February 2008,² Shelly awarded a subcontract to the Employer for the installation of replacement traffic signalization devices and highway lighting, including a traffic video detection system, at the intersection of Steels Corners and State Route 8 in Summit County, Ohio. The construction project was publicly funded by the Ohio Department of Transportation. As part of this project, the Employer was responsible for the removal of existing traffic signalization devices and highway lighting and the excavation and trenching associated with the lighting/signal work. The Employer assigned that work to its Electrical Workers-represented employees.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, ___ F.3d ___, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

² Unless otherwise specified, all dates are in 2008.

Electrical Workers Business Manager Patrick Grice testified that in late May or early June (after the project had commenced) the Employer's manager, Brad Ritenour, notified him that members of Operating Engineers had approached Electrical Workers-represented employees at the jobsite, stating that they were doing Operating Engineers' work. Grice added that he told Ritenour in response that "that's our work."

On July 11 and August 12, Operating Engineers filed two grievances against Shelly, both challenging the use of Electrical Workers-represented operators to perform the excavating work on the project.³ By letter dated August 8, Shelly notified the Employer of the grievances and warned that should Operating Engineers prevail "[Shelly] will deduct these costs from the total due on [the Employer's] subcontract." Subsequently, the Employer notified Electrical Workers of the grievances filed against Shelly and the possibility of the costs of these claims being deducted from the Employer's subcontract with Shelly.

On October 14, Grice met with the Employer's president and CEO, Larry Thompson. During the meeting, Thompson asked Grice if there was any way the Employer could employ an Operating Engineers member on the project as a way of relieving some of the pressure from Shelly. Grice stated that "there's no way that I'm going to concede IBEW jobs," and that he would "do whatever he had to do to protect [his] members' right to perform this work." Thompson responded that he would continue to pursue other options to relieve the problem.

On October 20, Grice sent a letter via fax to the Employer stating that under its collective-bargaining agreement with NECA Electrical Workers is the Employer's exclusive source for the referral of applicants for employment. The letter further stated that Electrical Workers would not relinquish any jobs covered under the collective-bargaining agreement, and that any breach or violation of the agreement would result in a grievance against the Employer.

On October 21, the Employer met with Operating Engineers President Ken Triplett, its vice president and business representative, Floyd Jeffries Sr., and its District 6 representative, Steve DiLoretto. A representative for Shelly, Andy Leffler, was also present. Thompson began by stating that the purpose of the meeting was to "try to resolve the issue on the state road project and any and all future issues that [the Employer] might encounter with the Operating Engineers relative to who can operate the equipment." Triplett stated that his union has "no prob-

lems with Thompson Electric" and, pointing at Leffler, said that "our problem [is] with . . . Shelly & Sands."

Thompson stated that the Employer has been financially threatened by the dispute, because if Operating Engineers' grievances against Shelly were successful the amounts owed by Shelly would be deducted from Shelly's contractual payments to the Employer. Jeffries responded that the work is clearly Operating Engineers' work. Thompson testified he then asked what work on the project Operating Engineers was claiming, and Jeffries responded that it's Operating Engineers' work "if it's got rubber tires or tracks."⁴ Thompson then asked Jeffries whether Operating Engineers would claim work using mini-excavators and trenchers. Jeffries again responded, "[A]nything with rubber tires and tracks is our work." Thompson also asked about the operation of bucket trucks and line trucks, and Jeffries responded that if the equipment is used on a highway construction project, Operating Engineers would claim it for its members.

Thompson then expressed concerns about assigning the disputed work to Operating Engineers members, because the Employer's trenching work is sporadic and incidental. Jeffries responded that this was not his concern.

Thompson asked Jeffries what he believed his options were with respect to this job and similar jobs in the future. Jeffries suggested that Thompson sign a binding letter of assent to the statewide OCA collective-bargaining agreement with Operating Engineers and hire its members to run the Employer's equipment. Thompson rejected this, stating that this would conflict with the Employer's contract with Electrical Workers. Jeffries then suggested that the Employer sign a limited "project letter of assent," allowing the Employer to either employ Operating Engineers members or to continue using Electrical Workers-represented employees while remitting all fringe benefits to Operating Engineers' benefit funds. Thompson rejected this option as well.

Thompson also testified that for 2 weeks in November the Employer temporarily relinquished the excavation/trenching work on the project to Shelly, thereby allowing a composite crew of Operating Engineers and Electrical Workers operators to perform the installation work.⁵ Shelly sent the Employer a breakdown of the costs associated with the work performed by the Operating Engineers, and deducted the wages, fringe benefit contribu-

⁴ Triplett similarly testified that Jeffries responded that "if it had rubber tires and tracks, it was [Operating Engineers']."

⁵ Electrical Workers' member, Thomas Carney, similarly testified that at some time in the fall the Employer's employees were pulled off the jobsite and Operating Engineers began to work on the project.

³ Operating Engineers settled its grievances with Shelly on January 6, 2009.

tions, and equipment rental charges from its contractual payments to the Employer.

In a letter to the Employer dated November 26, Electrical Workers stated that it had come to its attention that the Employer had or was “in the process of assigning electrical work covered under the [NECA] Collective Bargaining Agreement to non-IBEW employees.” The letter further stated that “[b]latant disregard for the Collective Bargaining Agreement will result in grievances being filed against [the Employer],” that “Picket Lines and Strike activity will also be levied against [the Employer],” and that Electrical Workers “will do what’s necessary to protect the integrity of the Collective Bargaining Agreement and IBEW jobs.”

B. Work in Dispute

The work in dispute is the operation of backhoes, mini-excavators, small directional borings, trenchers, line trucks, and other similar equipment related to the performance of electrical equipment installations, site grading, and pole placement and erection at the Steels Corner Interchange jobsite located in Stow, Ohio.

C. Contentions of the Parties

The Employer and Electrical Workers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there are competing claims for the disputed work. They contend that Operating Engineers pressed its claim for the work directly to the Employer when, during the October 21 meeting, Jeffries told Thompson that the disputed work on the jobsite is clearly Operating Engineers’ work, and that such work belonged to members of Operating Engineers if it involves “rubber tires or tracks.” They further contend that, consistent with a claim for the work in dispute, Operating Engineers proposed that the Employer either sign a letter of assent or a project labor agreement. In view of this evidence, the Employer and Electrical Workers assert that there are competing claims for the work at issue, and that the Operating Engineers’ motion to quash should be denied.

On the merits, they assert that the work in dispute should be awarded to employees represented by Electrical Workers. They rely on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

Operating Engineers contends that the notice of hearing should be quashed. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) (union’s action through grievance procedure to enforce claim against general contractor does not constitute a claim to the subcontractor for the work in dispute), Operating Engineers

argues that it only pursued contractual grievances against Shelly for failing to honor the subcontracting clause in the OCA collective-bargaining agreement. Operating Engineers also argues that the Employer and Electrical Workers contrived the threat in order to create a jurisdictional dispute and thereby obtain the work assignment preferred by the Employer.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees;⁶ (2) a party has used proscribed means to enforce its claim to the work in dispute;⁷ and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.⁸ On this record, we find that this standard has been met.

1. Competing claims for work

We find that there are competing claims for the work. Electrical Workers has at all times claimed the work in dispute for the employees it represents, and these employees have been performing the work. Further, its November 26 letter to the Employer claimed the work in dispute for the employees it represents.

Operating Engineers contends, however, that it has not claimed the work in dispute, but rather merely filed grievances against Shelly for breach of the subcontracting clause in the OCA collective-bargaining agreement. We disagree. As stated above, Thompson’s testimony shows that at the October 21 meeting Jeffries told Thompson that the disputed work clearly belonged to Operating Engineers, and that if the work on this project and others involved “rubber tires or tracks” it is Operating Engineers’ work. Jeffries further stated, according to Thompson, that the Employer could resolve the dispute by signing a binding letter of assent and hiring employees represented by Operating Engineers, or by signing a limited project letter of assent permitting the use of Electrical Workers employees but with fringe benefit payments remitted to Operating Engineers benefit funds. Moreover, Thompson testified that for a period of time in November the Employer acquiesced to a request from Shelly to allow Operating Engineers’ members to per-

⁶ *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001).

⁷ See, e.g., *Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004).

⁸ *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138–1139 (2005).

form the disputed work, and that the Employer reimbursed Shelly for the cost of the work performed by Operating Engineers members.⁹ Although Operating Engineers disputes the validity of this testimony, we find that it is sufficient to establish reasonable cause to believe that Operating Engineers made a claim for the disputed work. See *J.P. Patti Co.*, 332 NLRB 830, 832 (2002).¹⁰

2. Use of proscribed means

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. It is well established that a picketing threat constitutes proscribed means. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). As set forth above, Electrical Workers stated in its November 26 letter to the Employer that if the Employer assigned the work to employees other than those represented by Electrical Workers “Picket Lines and Strike activity [would] be levied against [the Employer],” including “what’s necessary to protect the integrity of the Collective Bargaining Agreement and IBEW jobs.”

Operating Engineers argues that Electrical Workers’ threat was contrived in order to obtain the work assignment through this 10(k) proceeding. Operating Engineers does not, however, offer any direct evidence demonstrating that Electrical Workers did not intend its threat seriously. In the absence of such evidence, a charged party’s use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe that Section 8(b)(4)(D) has been violated. See, e.g., *Cretex*, supra at 1032.

3. No voluntary method for adjustment of dispute

The parties have stipulated, and we find, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound.

In view of the evidence above, we find reasonable cause to believe that there are competing claims for the work in dispute and that a violation of Section 8(b)(4)(D) has occurred, and that no voluntary method exists for adjustment of the dispute. We thus find that the dispute is properly before the Board for determination, and ac-

cordingly deny Operating Engineers’ motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410 (1962).

The following factors are relevant in making the determination in this dispute.¹¹

1. Certifications and collective-bargaining agreements

There is no evidence of Board certifications concerning the employees involved in this dispute.

The parties stipulated that the Employer is bound to a collective-bargaining agreement between NECA and Electrical Workers. That agreement covers the “installation and maintenance of highway and street lighting, highway and street sign lighting, electric message boards and traffic control systems, camera systems, traffic signal work, substation and line construction, including overhead and underground projects” and “includes the operation of all tools and equipment necessary for the installation of the above projects.”

In contrast, it is undisputed that the Employer does not have a collective-bargaining agreement with Operating Engineers.¹² Accordingly, we find that this factor favors an award of the disputed work to the employees represented by Electrical Workers.

2. Employer preference and past practice

The Employer, in accordance with its past practice, assigned the disputed work to its employees represented by Electrical Workers.

At the hearing, Thompson testified that the Employer has performed this type of work for approximately 20 years using Electrical Workers-represented employees, and that the Employer prefers that this work remain with Electrical Workers-represented employees. There is no evidence that the Employer has used employees repre-

⁹ See *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994) (performance of work by a group of employees is evidence of a claim for work by those employees, even in the absence of an explicit claim).

¹⁰ The Board need not rule on the credibility of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998).

In view of the evidence that Operating Engineers made a claim directly to the Employer for the work in dispute and actually performed some of the work (in addition to pursuing grievances against Shelly), we find the instant case distinguishable from *Capitol Drilling*, supra.

¹¹ In view of its contention that it has not claimed the disputed work for its members, Operating Engineers declined to present any evidence on the merits.

¹² Although Operating Engineers has a collective-bargaining agreement with Shelly, that agreement is not applicable because the company that ultimately controls and makes the job assignment is deemed to be the employer for purposes of a 10(k) proceeding. *Plasterers Local 502 (PBM Concrete)*, 328 NLRB 641, 644 (1999); *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989).

sented by Operating Engineers to perform work of the kind in dispute. Accordingly, we find this factor favors an award of the disputed work to employees represented by Electrical Workers.

3. Area and industry practice

Electrical Workers Business Manager Grice testified that employees represented by Electrical Workers have performed work of the kind in dispute for many years. Grice also testified that Electrical Workers members performed this work in the surrounding areas of Cleveland, Columbus, Dayton, Cincinnati, and Mansfield, Ohio. In addition, Electrical Workers-member Thomas Carney testified that for many years he and other members of Electrical Workers have worked on other area projects involving work of the kind in dispute.

As noted above, the record shows that, for a brief period, Shelly performed the work in dispute using employees represented by Operating Engineers. However, there is no other evidence suggesting an area or industry practice of Operating Engineers members performing work of the kind in dispute. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

4. Relative skills

Electrical Workers presented testimony that its members possess the requisite skills and training to perform the disputed work, and that they are experienced in doing so. Specifically, Grice testified that operators represented by Electrical Workers are trained and experienced in performing the work involved, and Carney testified that members of Electrical Workers possess the skills needed to operate the equipment used to perform the work. In addition, Thompson testified that his Electrical Workers-represented employees have the skills and experience to operate the equipment, and that they are required to attend extensive safety training before they are permitted to operate the Employer's equipment.

Operating Engineers President Ken Triplett testified that Operating Engineers members have operated trenching and excavation equipment in highway construction. However, Operating Engineers did not present evidence specifically addressing whether its members possess the relative skills required to perform work of the kind in dispute.¹³ Accordingly, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

¹³ As noted above, the record indicates that for a brief period in November Shelly employed members of Operating Engineers to perform the work in dispute. However, that evidence does not indicate the extent of the relative skills and experience possessed by these employees.

5. Economy and efficiency of operations

Thompson testified that it is more efficient for the Employer to perform the work in dispute using members of Electrical Workers. He explained that when performing the disputed work these employees perform related tasks such as installing electrical conduits, pulling wires, and setting junction boxes. Thompson added that these tasks would not be performed by Operating Engineers-represented employees if they were assigned the work in dispute. Grice similarly testified that while performing the work in dispute Electrical Workers-represented employees assist in the performance of other work, such as building foundation forms, inserting the cages, pouring concrete, setting poles, and setting mast arms. In view of the foregoing evidence, we find that this factor favors an award of the work in dispute to employees represented by Electrical Workers.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Electrical Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of certifications and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Electrical Workers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Thompson Electric, Inc., represented by Local Union No. 71, International Brotherhood of Electrical Workers, are entitled to perform the operation of backhoes, mini-excavators, small directional borings, trenchers, line trucks, and other similar equipment related to the performance of electrical equipment installations, site grading, and pole placement and erection at the Steels Corner Interchange jobsite located in Stow, Ohio.

Dated, Washington, D.C. July 14, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD